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In the Supreme Court of the United States

No. 422.

OCTOBER TERM, 1964.

FEDERAL TRADE COMMISSION,

Petitioner,

v.

CONSOLIDATED FOODS CORPORATION,

Respondent.

BRIEF AMICUS CURIAE OF TRABON ENGINEERING CORPORATION, THE F. D. JOHNSON COMPANY AND WAYNE G. RITTER, d. b. a. RITTER ENGINEERING COMPANY.

INTEREST OF AMICUS CURIAE.

Trabon Engineering Corporation (hereinafter called "Trabon"), an Ohio corporation having its principal place of business at Solon, Ohio, is a privately held and independently owned company. Its principal business is the manufacture and sale of heavy industrial centralized lubricating systems and accessories and auxiliary devices therefor.

The F. D. Johnson Company (hereinafter called "Johnson") is an Ohio corporation with its principal place of business also at Solon, Ohio. Johnson is a distributor of Trabon's products.

Wayne G. Ritter is a resident of Pittsburgh, Pennsylvania, residing at 30 Glen Ridge Lane. Under the name of Ritter Engineering Company, he does business as a distributor of Trabon's products.

Trabon, Johnson and Ritter are plaintiffs in *Trabon Engineering Corporation, et al. v. Eaton Manufacturing Company*, No. C 62-882, an antitrust action pending in the United States District Court for the Northern District of Ohio, Eastern Division, and alleging, *inter alia*, a violation of Section 7 of the Clayton Act.[1] That action was filed on December 19, 1962 and is currently in the discovery stage.

The interest of Trabon, Johnson and Ritter as *amicus curiae* is founded upon the close parallel between the question presented to the Court in this case and the main issue of their pending action. While factual differences exist, the basic principles involved are the same. On September 25, 1964, these parties filed a motion for leave to file a brief *amicus curiae* on the Petition for Writ of Certiorari. That motion was granted by the Court on November 16, 1964.

Both the Solicitor General and respondent, Consolidated Foods Corporation, have consented to the filing of this brief. Pursuant to Rule 42(2) of the Revised Rules of the Supreme Court, copies of their written consent are submitted herewith.

The instant case presents questions of substantial importance in the enforcement of Section 7 of the Clayton Act. These questions are important to private enforcement of the statute, as well as to its enforcement by governmental agencies. This brief, submitted by private litigants who are seeking relief under Section 7, may be helpful to the Court in resolving the questions presented to it in this case.

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[1] 64 Stat. 1125 (1950), 15 U. S. C. § 18 (1958), amending 38 Stat. 731 (1914).

QUESTION PRESENTED.

Whether the effect may be substantially to lessen competition, or to tend to create a monopoly, within the meaning of Section 7 of the Clayton Act, when a large and diversified company acquires one of several single-line companies that compete in supplying an industry in which the acquiring company is a major purchaser.

THE ACQUISITION, SUMMARY OF PROCEEDINGS, AND REQUEST FOR REVERSAL.

In 1951 Consolidated Foods Corporation, a large and diversified food company owning processing plants and a nationwide network of wholesale and retail outlets, acquired Gentry, Incorporated, a small firm principally engaged in the manufacture and sale of dehydrated onion and garlic. The Federal Trade Commission held that this acquisition created a "serious danger" [1a] that reciprocal buying relationships would foreclose competitors from a substantial portion of the dehydrated onion and garlic market, and ordered divestiture. The Commission's order was set aside by the Court of Appeals for the Seventh Circuit because "[n]o substantial impact on the relevant market" [1b] was shown by post-acquisition evidence.

For the reasons set forth in this brief and for the further reasons as stated in the brief of the government, we respectfully request that the decision of the Court of Appeals be reversed and the Federal Trade Commission's order of divestiture be reinstated.[2]

[1a] Record, vol. I, p. 55.

[1b] Record, vol. VI, p. 2692, 329 F. 2d 623, 626 (7th Cir. 1964).

[2] For a similar ruling in a Section 7 proceeding, see *Federal Trade Commission v. Western Meat Co.*, 272 U. S. 554 (1926).

ARGUMENT.

A. RECIPROCITY AND THE APPLICATION OF THE ANTITRUST LAWS.

This case is the first to involve the application of Section 7 of the Clayton Act to a conglomerate's acquisition that gives rise to reciprocity opportunities, and the first such case to be reviewed by this Court. The Court is not being called upon to declare all reciprocity illegal; it is only being asked to consider the legality under Section 7 of a merger that creates an environment conducive to reciprocity and that gives rise to great reciprocity opportunities—a merger that makes reciprocity a viable business tool.

Much has been said recently on the subject of reciprocity by lawyers,[3] economists[4] and laymen.[5] It is popu-

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[3] *Conglomerate Mergers Under Section 7 of the Clayton Act*, 72 YALE L. J. 1265 (1963); Day, *Conglomerate Mergers and "The Curse of Bigness,"* 42 N. C. L. REV. 511 (1964); Day, *Merger Developments in the Supreme Court*, 26 ABA ANTITRUST SECTION 233 (1964); Donnem, *The Conglomerate Merger and Reciprocity*, 8 ANTITRUST BULL. 283 (1963); Hale & Hale, *Reciprocity Under the Antitrust Laws: A Comment*, 113 U. PA. L. REV. 69 (1964); Handler, *Emerging Antitrust Issues: Reciprocity, Diversification and Joint Ventures*, 49 VA. L. REV. 433 (1963); Harsha, *The Conglomerate Merger and Reciprocity—Condemned by Conjecture*, 9 ANTITRUST BULL. 201 (1964); Hausman, *Reciprocal Dealing and the Antitrust Laws*, 77 HARV. L. REV. 873 (1964); Krash, *Panel Discussion of August, 1963 at Chicago, New Frontiers in Section 7 Enforcement* 13 (ABA Antitrust Section 1963); Phillips, *Reciprocity Under the Antitrust Laws: Observations on the Hales' Comment*, 113 U. PA. L. REV. 77 (1964).

[4] Ammer, *Realistic Reciprocity*, 40 Harv. Bus. Rev. 116 (1962); Edwards, *Conglomerate Bigness as a Source of Power*, in BUSINESS CONCENTRATION AND PRICE POLICY 331 (1955); Stocking and Mueller, *Business Reciprocity and the Size of Firms*, 30 J. of Bus. of the Univ. of Chicago 73 (1957).

[5] *Back Scratching Deals Raise Antitrust Ire*, Business Week, Feb. 9, 1963, p. 45; *Crackdowns On Reciprocity, Joint Ventures Foreseen*, Steel, March 18, 1963, p. 27; Mandell, *Reciprocity—Industry's Secret Sales Weapon*, Dun's Review and Modern In-

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larly regarded simply as the very human practice of patronizing one's friends. Reciprocity was described by the Commission below as basically "the practice whereby firms, overtly or tacitly, make concessions to one another in order to promote their own business interests." [5a] The type of reciprocity involved in this case, and that generally intended by use of this term in an antitrust context, is reciprocal buying.[6] As stated by the Commission, reciprocal buying involves nothing more than the simple idea that "I will buy from you if you will buy from me," or the unspoken "If I buy from him, he will buy from me." [6a] Obviously, there are several variants such as, "If I don't buy from him, he won't buy from me."

Distinctions have been made between "psychological reciprocity" and "coercive reciprocity," the first connoting buying power or leverage and the second overt threats and promises.[7] The latter is also referred to as "overt reciprocity." [8] Another relatively tenuous form of reciprocity, not here directly involved, is "secondary reciprocity," [9] also called "round-robin" reciprocity,[10] or "multiple deals." [11]

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dustry, September 1960, p. 32; *Reciprocity, A Dilemma for Purchasing Agents,* Electrical World, September 24, 1962, p. 45; *Reciprocity—Dangerous Selling Tool Winning New Users!* Sales Management, May 20, 1960, p. 40; *Reciprocity Doesn't Have to be a Dirty Word,* Purchasing, March 30, 1959, p. 80; *Reciprocity Smirks Behind the Sales Smile,* Chemical Week, November 22, 1958, p. 38; Sloane, *Reciprocity: Where Does the P. A. Stand?,* Purchasing, November 20, 1961, p. 70; Teeple, *The P. A. Faces Reciprocity,* Purchasing, January 1955, p. 81.

[5a] Record, vol. I, p. 55.

[6] Other forms have been recognized however, e.g., reciprocal preferential price treatment. See Phillips, *supra* note 3, at 78.

[6a] Record, vol. I, p. 56.

[7] Krash, *supra* note 3, at 16.

[8] Day, *supra* note 3 (first item), at 530.

[9] Ammer, *supra* note 4, at 119; Krash, *supra* note 3, at 15.

[10] Day, *supra* note 3 (first item), at 531.

[11] Ammer, *supra* note 4, at 119.

Reciprocity in its vertical aspect may be an alternative to ownership integration between stages of production or distribution—it may be a species of contract integration or of integration by informal understanding.[12] Although the Court's task here is limited to determination of the application of Section 7 of the Clayton Act, it should be noted that reciprocity is analogous to tie-in sales—a form of conduct specifically proscribed by statute[12a]—in that reciprocity and tie-in sales are both examples of the exercise of leverage power. Although a tie-in-differs from reciprocity in that it always involves overt conduct, it, like reciprocity, can also be considered a type of vertical integration.

Reciprocity has received some judicial attention. Three early decisions[13] in proceedings under Section 5 of

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[12] See Kessler & Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L. J. 1 (1959).

> "Vertical integration, the coordination of successive stages of production or distribution, has received considerable attention in recent years. This attention, however, has been confined largely to integration by stock or asset acquisition—ownership integration. Contract integration—vertical contractual arrangements such as requirement, output, exclusive dealing, franchise, consignment, and agency agreements—has just begun to be treated as a form of vertical integration although it is widely used to achieve industrial coordination and even control. Nor have informal understandings which are ancillary to formal contracts and which aim at coordination been included in an overall concept of integration.
>
> As a result, the functional similarities or differences between these alternative methods of integration have been underemphasized or ignored. Contractual arrangements aimed at coordinating the supply of materials or disposal of output frequently affect the contracting firms, as well as the rest of the industry, in much the same way as ownership of suppliers or outlets does. * * *" (references to footnotes omitted.)

[12a] 38 Stat. 731 (1914), 15 U. S. C. § 14 (1958).

[13] *California Packing Corp.*, 25 F. T. C. 379 (1937); *Mechanical Mfg. Co.*, 16 F. T. C. 67 (1932); *Waugh Equipment Co.*, 15 F. T. C. 232 (1931).

the Federal Trade Commission Act[13a] considered overt or coercive reciprocity. In a recent decision involving Section 7 of the Clayton Act reciprocity was an important factor.[14] In a pending Section 7 proceeding (other than the present case) reciprocity is of major significance.[15] Reciprocity was considered by the district court[16] in a Section 7 case recently remanded by this Court for further proceedings.[17] In addition, a civil action[18] brought by the Department of Justice is pending, alleging violations of Section 2 of the Sherman Act,[18a] and Section 7 of the Clayton Act, based in part upon defendant's purchasing power and reciprocity practices.

The practice of reciprocity is popular and widespread,[19] and has existed for many years.[20] Despite this

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[13a] 38 Stat. 719 (1914), 15 U. S. C. § 45 (1958).

[14] *United States v. Ingersoll-Rand Co.*, 218 F. Supp. 530, 552 (W. D. Pa. 1963), *aff'd*, 320 F. 2d 509, 524 (3rd Cir. 1963). This opinion considered "secondary" or "round-robin" reciprocity and discounted the importance of post-acquisition evidence in predicting probable competitive effects of an acquisition.

[15] *United States v. General Dynamics Corp.*, Civil No. 62-3686 S. D. N. Y. 1962.

[16] *United States v. Penn-Olin Chem. Co.*, 217 F. Supp. 110, 126 (D. Del. 1963).

[17] *United States v. Penn-Olin Chem. Co.*, 378 U. S. 158 (1964).

[18] *United States v. General Motors Corp.*, Civil No. 63-80, N. D. Ill. 1963. A companion indictment was recently dismissed for lack of evidence. *United States v. General Motors Corp.*, Cr. No. 61-356, S. D. N. Y. 1961, *transferred* Cr. No. 61-340, N. D. Ill. 1961, *dismissed* December 28, 1964.

[18a] 69 Stat. 282 (1955), 15 U. S. C. § 2 (1958), amending 26 Stat. 209 (1890).

[19] See *Swapping Business—Court Suits Show How Companies Reciprocate In Buying and Selling*, Wall Street Journal, Dec. 4, 1963, p. 1, col. 6; and the survey of a representative group of manufacturing companies reported by Sloane, *supra* note 5.

[20] Adam Smith wrote: "[I]t is the most underling tradesmen only who make it a rule to employ chiefly their own customers. A great trader purchases his goods always where they

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wide and long existence, and the early writings[20a] and even earlier Federal Trade Commission decisions,[21] until recently reciprocity has been ignored or its full effects overlooked in a number of antitrust contexts. These early Commission decisions make it clear that reciprocity, at least as a practice, can be a method of unfair competition within Section 5 of the Federal Trade Commission Act. But not until the 1960's was reciprocity challenged as a violation of Section 1 of the Sherman Act,[22] or as a form of predatory conduct violative of Section 2 of the same Act.[23] It would seem clear that reciprocity also can lead to a violation of Section 2(a) of the Robinson-Patman Act,[24] but we know of no case involving the point. With the exception of the present action, only in the past two or three years have actions under Section 7 of the Clayton Act dealt with reciprocity.[25]

Since we believe that the *practice* of reciprocity is inherently anticompetitive, a *per se* approach might be applied to such practice. On the other hand, such an approach is not desirable in a case where the issue is whether

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are cheapest and best, without regard to any little interest of this kind." Smith, WEALTH OF NATIONS 460 (Mod. Lib. ed. 1937), noted by Hausman, *supra* note 3, at 1.

[20a] See Edwards, Stocking and Mueller, *supra* note 4, and Teeple, *supra* note 5.

[21] See *supra* note 13.

[22] 69 Stat. 282 (1955), 15 U. S. C. § 1 (1958), amending 50 Stat. 693 (1937), which amended 26 Stat. 209 (1890). See Complaint, also alleging a Section 1 offense, in *United States v. General Dynamics Corp.*, *supra* note 15.

[23] See civil action cited *supra* note 18.

[24] 49 Stat. 1526 (1936), 15 U. S. C. § 13(a) (1958), amending 38 Stat. 730 (1914). See Phillips, *supra* note 3, at 78.

[25] See cases cited *supra* notes 14 and 15, and civil action cited *supra* note 18.

an acquisition that gives rise to reciprocity *opportunities* violates Section 7. Here, as in other Section 7 cases, it is necessary to determine whether the effect of the merger may be substantially to lessen competition.

B. FACTORS TO CONSIDER IN GAUGING SUBSTANTIALITY.

As in many other cases that have involved the application of Section 7 of the Clayton Act, the consideration of primary importance is whether the change in the market structure has brought with it a probability of substantial lessening of competition or a tendency to create a monopoly. In the conventional horizontal or vertical case, analysis is focused on the quantitative measure of concentration or foreclosure—the shares and rank of the companies in the relevant market, and in particular, the shares of the consolidated companies. On the other hand, the tests for determining the legality of a conglomerate acquisition or merger must of necessity be different. What can serve to gauge substantiality where the adverse effects on competition resulting from the change in market structure do not involve the present elimination of a competitor, supplier or customer? The answer is that in judging the legality of a conglomerate structural change, there are certain "quasi-vertical" and "quasi-horizontal" factors to be considered.

We believe that attention should first focus on the significant "quasi-vertical" factor present here—namely, post-acquisition power or leverage with respect to suppliers. As indicated above, reciprocity is analogous to alternate forms of vertical combinations other than ownership integration. And the Commission directly compared reciprocity to vertical ownership integration, stating:

> "In a vertical merger the danger to competition lies in the likelihood that the union of previously independent supplier and customer companies will foreclose their share of the market to competitors who previously had an equal opportunity either to buy from the supplier company or to sell to the customer company. So too with reciprocity resulting from a conglomerate or diversification merger. Here competition will be adversely affected if the reasonable likelihood arises that Gentry's competitors will be to some degree foreclosed by the Gentry-Consolidated merger from having the opportunity of selling to that portion of the market composed of Consolidated's suppliers." [26]

Thus while this is not a vertical merger or acquisition, the Commission did recognize that it was analogous to forms of vertical integration, and that hence it had vertical aspects. More broadly, the Commission inquired whether the acquisition transformed the market structure sufficiently "to create an environment conducive to anticompetitive reciprocity." [26a] Such an inquiry includes the question of whether Consolidated, following the acquisition of Gentry, possessed a leverage power that would have the probable effect of substantially lessening competition. Some of the indicators of this leverage power are enumerated below:

> 1. *Suppliers or potential suppliers are customers or potential customers.* By virtue of the acquisition, one division of the merged or consolidated firm is in a position to buy from suppliers who themselves, or whose own suppliers,[27] are in a position to buy from the other division of the merged firm.

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[26] Record, vol. I, p. 57.

[26a] Record, vol. I, p. 58.

[27] A preliminary injunction against a merger involving such "secondary reciprocity" was approved in *United States v. Ingersoll-Rand Co., supra* note 14.

2. *Cross-elasticity of demand* between the products of the suppliers and potential suppliers of the conglomerate, and also between the products of the acquired company and its competitors.

3. *Lack of market symmetry* following the acquisition. In this case what was a symmetrical market prior to the acquisition of Gentry became unbalanced with several small companies and one giant conglomerate.[28]

4. *Diversification.* Stocking and Mueller discuss diversification at some length,[29] and it deserves special attention. They state:

> "The large diversified firm has better opportunities for using reciprocal buying than the single-line producer * * * to use its buying power readily to increase sales, a firm must find a potential buyer of the goods it sells that is also a potential supplier of the goods it buys. Single-line producers may not always find one. * * * A firm that makes many products can more readily find a supplier that is also a potential buyer of what it makes. * * *
>
> Diversification not only increases the number of opportunities for reciprocal buying; it increases their magnitude. A single-line producer, even though a near-monopolist, may buy so little of some material that reciprocal buying has little influence on suppliers as potential customers. But by diversifying—making other products requiring the same input—a firm may so enlarge its buying as to give it the power to increase its sales." [30]

In the foregoing we have focused on the "quasi-vertical" features of the acquisition involved here. Presence of

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[28] These indicators are discussed by Ammer at 116-7, and by Stocking and Mueller at 75-7, *supra* note 4.

[29] *Id.* at 76-7.

[30] *Ibid.*

some of the above enumerated factors are indications of the existence of a leverage power, the exercise of which may result in foreclosure of a market to competitors of the acquired company. Another important consideration, differing from the above in that it is of a horizontal nature, is the comparative size and financial strength of the acquiring company. This consideration is related to what is variously called the "deep-pocket," "subsidization," "rich-parent," or "war-chest" theory. Two recent cases have stressed its importance. In *Reynolds Metals Co. v. Federal Trade Commission*[31] the court stated:

> "Arrow's assimilation into Reynolds' enormous capital structure and resources gave Arrow an immediate advantage over its competitors who were contending for a share of the market * * * The power of the 'deep-pocket' or 'rich parent' for one of the florist foil suppliers in a competitive group where previously no company was very large and all were relatively small opened the possibility and power to sell at prices approximating cost or below and thus to undercut and ravage the less affluent competition." [31a]

Similar observations were made in the Federal Trade Commission decision in *Procter & Gamble Co.*[32] In that decision the Commission stressed emphatically that it was not adopting any view that bigness *per se* is anti-competitive, but that size is significant only insofar as it is highly disparate compared with the size of the firms in the relevant market. Disparity of size, not absolute size, the Commission noted, has importance in a merger case of this type. Although the deep-pocket theory was not as such considered by the Commission in the present case, we feel

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[31] 309 F. 2d 223 (D. C. Cir. 1962).

[31a] 309 F. 2d at 229-30.

[32] TRADE REG. REP. ¶ 16,673, (FTC Dkt. 6901, 1963).

it is an important factor and worth emphasizing. The combination of leverage power and the "deep-pocket" certainly constitutes a serious danger to competitors, both present and potential, in the market of the acquired company.

C. PROBABLE EFFECTS OF THE ACQUISITION.

The probable effects flowing from the presence of these "quasi-vertical" and "quasi-horizontal" factors are likely to be substantial. As is the case with the above factors, the effects may also be characterized as either vertical or horizontal.

First and foremost in this case are the reciprocity opportunities and the reciprocity-conducive environment created by the merger. Following the merger, competitors of the acquired company attempt to remain independent and to continue to compete. They lose little (and gain little) for the first few years. But sooner or later profound changes in market behavior can be expected to follow the changes in market structure worked by the acquisition. These changes can be considered with respect to firms which, prior to the acquisition, have various customer-supplier relationships with the merged companies, as follows:

Bought from acquired company and sold to acquiring company.

The merger, overnight, automatically brings into existence mutual buying relationships between the acquiring company or conglomerate and the members of the industry that supplies the conglomerate who are both established customers of the acquired company and established suppliers of the conglomerate. Without the merger there is no mutual buying. But mutual buying relationships are

established by the merger and it is easy for these mutual buying relationships sooner or later to ripen into reciprocity—into a conscious unilateral or mutual buying decision or series of buying decisions based, at least in part, on the fact of existence of the mutual buying relationships. This effect was considered by the Commission, and it also referred to other effects, stating:

> "But this is only the most conservative calculation of the potential scope of reciprocity at Consolidated's command. Certainly many other prospective purchasers from Gentry could be influenced by the expectation or promise of reciprocal purchases of their products by Consolidated." [32a]

Such other effects are pointed out more fully in the following paragraphs.

Did not buy from acquired company but did sell to acquiring company.

As soon as the merger is publicized, members of the industry that supplies the conglomerate who are not established customers of the acquired company but who have been supplying the conglomerate and desire to continue to do so suddenly show promise as potential customers for the acquired company. Sooner or later this promise is likely to be fulfilled because for one reason or the other it may occur to such members of the industry supplying the conglomerate that their business with the conglomerate may suffer if they continue to do no business with the acquired company. To the extent that a member of such industry purchases from the acquired company because it is uneasy about the loss of business with the conglomerate, rather than by reason of the acquired company's superiority as to price, quality and service, then to

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[32a] Record, vol. I, p. 70.

that extent competition is suppressed between the acquired company and its competitors. To such extent, reciprocal buying between the conglomerate and the members of the industry that supplies the conglomerate is fostered by the merger.

Bought from acquired company but did not sell to acquiring company.

When the merger occurs, a potential for reciprocal buying is also created between the conglomerate and members of the industry that supplies the conglomerate who were not established suppliers of the conglomerate prior to the merger, but who were purchasing from the acquired company. These members of such industry will be reluctant to discontinue purchasing from the acquired company if they have any hope of becoming one of the suppliers of the conglomerate. To the extent that this reluctance results in foreclosing the competitors of the acquired company from a portion of the business with the industry that supplies the conglomerate, then to that extent is competition suppressed. This suppression of competition results from the mere existence of a reciprocity potential, and if this potential is realized and the conglomerate takes on a new supplier, then suppression of competition is further reinforced and entrenched.

Neither bought from acquired company nor sold to acquiring company.

The merger also creates a potential for reciprocal buying between the conglomerate and those members of the industry that supplies the conglomerate who have neither supplied the conglomerate nor purchased from the acquired company. Prior to the merger, these members of such industry might have chosen at any time to aggres-

sively seek part of the conglomerate's business, and if they had so chosen, they would have attempted to secure the sale by establishing their superiority as to price, quality, service, or all three. But the merger establishes the potentiality of reciprocal buying with the conglomerate, and this new and alien non-competitive factor will now have to be taken into account in calculating the chances of success. It is not unlikely that success in obtaining some of the conglomerate's business will be preceded, accompanied, or soon followed by a purchase from the acquired company.

In addition to the vertical effects of the merger, there are also effects of a horizontal nature. The change in the market structure will substantially reduce the ease of, or even make impossible, entry into the market. This fact is especially significant where, as here, the market is oligopolistic to begin with. Whatever confidence the enterprising businessman may have in the quality of his proposed product or the efficiency of his plan of production and marketing, his determination to enter will weaken when confronted with the fact that established firms have buyers tied in by reciprocal dealing. Not only are newcomers discouraged, existing competitors may divert their capital and efforts to other product markets or simply go out of business.

The merger may adversely affect the consumer who, after all, is a favored object of the antitrust laws. The product purchased may be higher in price or of an inferior quality than if price and quality were the only relevant considerations, and if so, the consumer suffers when he receives this inferior product or when the higher price is passed on to him.

Diversification (an indicator of a "quasi-vertical" factor—leverage) along with bigness or financial strength

(itself a "quasi-horizontal" factor—the "deep-pocket"), discussed above, are factors indicating an environment conducive to the effective exploitation of reciprocity. Conversely, some economists say reciprocity contributes to bigness and diversification. Stocking and Mueller state:

> "Bigness and diversification contribute to the effective use of reciprocal dealing, and reciprocal dealing contributes to bigness and diversification. Bigness may feed bigness and accelerate growth. While the technical, managerial, marketing, and financial optimums * * * are likely to be achieved in a quest for efficiency, attaining the security optimum necessitates a quest for power. Monopoly is its logical goal. Reciprocity contributes to bigness, and bigness brings security. Reciprocity, most effectively practiced by a large firm, not only contributes to internal growth but encourages growth through merger."[33]

While the growth of reciprocity as a *practice* is not susceptible to numerical tabulation, there is strong evidence that the trend toward bigness and diversification is increasing, thus, as the authors point out, contributing to the growth of reciprocity *opportunities*.[34]

D. POST-ACQUISITION EVIDENCE SHOULD NOT BE GIVEN DETERMINATIVE WEIGHT.

Illegality under Section 7 of the Clayton Act is premised on the fact that there "may be" a substantial lessening of competition, or a tendency to create a monopoly. There need be no present effect on competition—only the probability that there will be an anticompetitive effect in the future. Findings of past lessening of competition are not

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[33] *Supra* note 4, at 95.

[34] See comprehensive statistical study of this trend in *Recent Growth of Conglomerate Corporations*, F. T. C. Release, September 9, 1964.

required under the Section. In *United States v. E. I. du Pont de Nemours & Co.*,[35] the Court stated:

> "Section 7 is designed * * * to arrest in their incipiency restraints or monopolies in a relevant market which, as a reasonable probability, appear at the time of suit likely to result * * * The section is violated whether or not actual restraints or monopolies, or the substantial lessening of competition, have occurred or are intended. * * *" [36]

The District Court in the *du Pont* case concluded that thirty years of non-restraint negated any reasonable probability of such a restraint at the time of the suit. This Court disagreed, stating that:

> "We repeat, that the test of a violation of § 7 is whether at the time of suit there is a reasonable probability that the acquisition is likely to result in the condemned restraints." [37]

See also *American Crystal Sugar Co. v. Cuban-American Sugar Co.*[38] and *United States v. Maryland and Virginia Milk Producers Ass'n.*[39]

In *Brown Shoe Co. v. United States,*[40] this Court, in reviewing the legislative history of Section 7, indicated that Congress used the words "may be substantially to lessen competition" to indicate that its concern was for probabilities not certainties. The Court indicated that:

> "Statutes existed for dealing with clear-cut menaces to competition; no statute was sought for dealing with ephemeral possibilities. Mergers with a probable anti-

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[35] 353 U. S. 586 (1957).

[36] 353 U. S. at 589.

[37] 353 U. S. at 607.

[38] 259 F. 2d 524, 527 (2nd Cir. 1958).

[39] 167 F. Supp. 799 (D. D. C. 1958), *aff'd in part, and rev'd and remanded in part on other grounds*, 362 U. S. 458 (1960).

[40] 370 U. S. 294 (1962).

competitive effect were to be proscribed by this Act." [41]

See also *United States v. Philadelphia National Bank.*[42]

In view of the foregoing judicial statements, it is clear that post-acquisition evidence should not be given determinative weight. It has been said that "market behavior follows market structure," and that this was a postulate of Section 7's enactment.[43] As discussed above,[44] once a merger gives rise to reciprocity opportunities in an industry, reciprocity will probably sooner or later permeate the entire industry. This discussion demonstrates that reciprocity thus introduced is by no means limited to those reciprocal buying practices that obtain immediately upon or soon following a merger. The creation of opportunities for reciprocity is likely to be of wider and deeper significance. Such opportunities are brought into existence by a merger involving structural changes of the sort involved in this case; and to the extent that these opportunities are realized in the passing months, years, or even decades following the merger, then to that extent does reciprocity continue to flourish and grow as a result of the merger.

Furthermore, the acquiring company may choose temporarily to defer or postpone taking advantage of its overt or coercive reciprocity opportunities and even though members of the industry that supplies the acquiring company seek to join with that company in reciprocity relationships, the reciprocity picture may for an indefinite time be far from complete. Or, the members of such supplying industry may be slow to recognize their reciprocity

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[41] 370 U. S. at 323.

[42] 374 U. S. 321 (1963).

[43] *Procter & Gamble Co.*, TRADE REG. REP. ¶ 16,673 at 21,573 (FTC Dkt. 6901, 1963).

[44] See pages 13-16, *supra*.

opportunities, and here again the reciprocity picture will remain incomplete for an indefinite time.

Finally, the remaining competitors of the acquired company may offer price reductions and other inducements in an attempt to save their businesses. Such efforts will perhaps preserve their business temporarily but not over the long run.

These are only a few examples of why the economic data for a post-acquisition period may not reliably reflect the probabilities arising from the structual change in the market, that there will be a substantial lessening of competition.

E. PRIVATE ENFORCEMENT HANDICAPPED IF POST-ACQUISITION EVIDENCE IS DETERMINATIVE.

The government indicated in its brief in support of the petition for certiorari in this case that the requirement for post-acquisition evidence would greatly handicap enforcement of the act. This Court has found a Congressional intent that private self-interest be used as a means of enforcement of the antitrust laws.[45] If private self-interest is to play an effective part in enforcing Section 7, injured private parties must be afforded effective remedies.

In the present case, the Court of Appeals disturbed none of the findings of the Commission to the effect that the power of reciprocity was introduced into the market through the merger. The Court held, however, that negative post-acquisition evidence rebutted the probability of anticompetitive effect.[46] Such a doctrine can effectively frustrate both private and government actions. And unlike the government, the private litigant is confronted with a statute of limitations.[47] Under the rule announced

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[45] *Bruce's Juices, Inc. v. American Can Co.*, 330 U. S. 743, 751-2 (1947).

[46] Record, vol. VI, p. 2692, 329 F. 2d 623, 626 (7th Cir. 1964).

[47] § 4B, 69 Stat. 283 (1955), 15 U. S. C. § 15b (1958).

by the Court of Appeals, it is only necessary that the conglomerate suppress its reciprocity power for a few years after the acquisition, or that reciprocity opportunities be gradually rather than rapidly realized, and the private remedy provided by Congress will be unavailable.

A businessman menaced by a merger that creates reciprocity opportunities must be able to test its legality promptly. Even then he must overcome substantial obstacles such as difficulties of proof.[48] If post-acquisition evidence is required, delicate customer relationships, already damaged by the structural change, will be further harmed by involvement.[49] Important to an effective remedy, therefore, is the determination of the emphasis to be given post-acquisition evidence in determining the legality of mergers that give rise to opportunities for reciprocity. Is such evidence, if negative, to be given determinative effect with eyes closed to the fact that the environment is conducive to reciprocity and that reciprocity opportunities remain and may be realized after a judicial remedy has been denied to competitors?

If the Court of Appeals is correct here in giving decisive weight to post-acquisition evidence, private resistance to mergers that give rise to opportunities for reciprocity will be discouraged. But if the Court of Appeals is incorrect, a pronouncement to that effect will stiffen private resistance to such mergers.

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[48] Actual proof of reciprocal buying practices and relationships is difficult to obtain. They are likely to be shrouded in secrecy and executives and employees are unlikely to be willing to divulge their participation in or knowledge of such schemes. Informal or silent reciprocity is hardly subject to proof at all. A predisposition to purchase a customer's goods is particularly difficult to prove.

[49] A real dilemma of the private litigant is, on the one hand, a need of proof of anticompetitive conduct, and on the other hand, the adverse effects of litigation on customers who are likely to resent being involved or embarrassed by being drawn into litigation with *their* customers.

CONCLUSION.

It is respectfully requested that the Court reverse the decision of the Court of Appeals and reinstate the order of divestiture of the Federal Trade Commission in this action.

Respectfully submitted,

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